IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	CR-00-S-0422-S
	)	
ERIC ROBERT RUDOLPH,	)	
Defendant.	)	

REPLY TO UNITED STATES' RESPONSE TO THE COURT'S MEMORANDUM OPINION AND ORDER OF OCTOBER 14, 2004 REGARDING RUDOLPH'S MOTION FOR DISCOVERY OF MATERIALS RELATED TO THE SCIENTIFIC TESTING OF ATLANTA BOMBING EVIDENCE

COMES NOW the defendant Eric Robert Rudolph, by and through his undersigned counsel of record, and hereby files this reply to the *United States' Response to the Court's Memorandum Opinion and Order of October 14, 2004 Regarding Rudolph's Motion for Discovery of Materials Related to the Scientific Testing of Atlanta Bombing Evidence* (Doc. 368) filed on October 22, 2004.

I.

The Court's *Memorandum and Order* (Doc. 359) directed the government to answer two specific questions. The first question was:

> "If the defendant should point out to the jury that the government has chosen not to introduce any evidence of the Atlanta bombings, and (a) insinuates that the jury could look at that lack of evidence to establish reasonable doubt of the aggravating factor of future dangerousness, or (b) points to the lack of evidence as further proof of the mitigating factor of 'no significant prior history of other criminal conduct,' will the government maintain its position that it will not attempt to introduce any evidence regarding the Atlanta bombings."

379

Memorandum and Order, p. 9. The government's answer to this question is as follows:

> "In either situation, the government would be forced in rebuttal to 'set the record straight' regarding the Atlanta bombings, which would potentially involve calling hundreds of witnesses, extending the length of the trial by weeks or even months. The government's answer to the Court's first question is therefore 'no', it could not possibly maintain its current position under the circumstances the Court describes. The government could not be expected to simply stand by and watch as the defense constructed a straw house only to blow it down."

Response, Doc. 368 at 5.

The defense makes three observations about the government's response to the first question. First, the government does not and cannot, consistent with the Fifth and Eighth Amendments, make any contention that the defense is not entitled to adopt either or both of the strategies outlined in the Court's first question. *See generally*, *Tennard v. Dretke*, __U.S__, 124 S.Ct. 2562, 2570 (2004) and cases cited therein ("virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"); *Kelly v. South Carolina*, 534 U.S. 246, 122 S. Ct. 726 (2002) and cases cited therein (when a capital defendant's future dangerousness is at issue, due process entitles the defendant to rebut the government's showing of future dangerousness). In fact, the two arguments outlined in the Court's first question are not exhaustive as the defense could also use evidence of a false accusation in Atlanta to bolster an argument of lingering doubt on the Birmingham offenses. *See, Tarver v. Hooper*, 169 F. 3d. 710,716 (11th Cir. 1999) ("Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty."); *United States v. Davis*, 132 F. Supp. 2d 455 (E. D. La. 2001) (general federal law supported residual doubt sentencing argument and federal statute governing mitigation did not bar residual doubt argument).

Second, not only can the defendant adopt any of these strategies at the penalty phase, defense counsel is constitutionally obligated to investigate the factual basis for such strategies in order to provide effective assistance of counsel under the Sixth Amendment. Appointed counsel

in a death penalty case must be diligent in fulfilling their responsibilities as outlined in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003 ed.), standards to which the United States Supreme Court "long ... [has] referred as 'guides to determining what is reasonable.'" *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 2537 (2003). *See also, Hamblin v. Mitchell,* 354 F.3d 482, 486 (6th. Cir. 2003) ("the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases"). Guideline 10.11(A) provides that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." Guideline 10.11(B) provides that "[c]ounsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible." Guideline 10.11(L) provides that "[c]ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client". Each of these Guidelines would be violated if the defense sat idly by and failed to take full advantage of the government's failure to prove the Atlanta crimes by arguing that it undercuts the case for future dangerousness, by showing that it establishes the mitigating factor that the defendant has no criminal record or history of violent criminal conduct, by arguing that it shows lingering doubt on the Birmingham offenses, and by arguing that Mr. Rudolph is not the "worst of the worst" because the government has not shown that he will be a future danger, that he has committed other offenses, or that he is beyond all doubt guilty of the Birmingham offenses.

Third, the government's threat to call "hundreds of witnesses" to rebut any arguments or evidence about lack of future dangerousness or lack of prior criminal history underscores the

defense's obligation to carefully investigate this potential area of rebuttal before its opens the door to an onslaught of witnesses who, in the government's words, could extend the length of the trial "by weeks or even months." (*Response*, p. 5) Guideline 10.11(G) of the A.B.A. Guidelines makes crystal clear counsel's obligation with respect to penalty phase rebuttal evidence:

> "In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges."

The Commentary to this Guideline elaborates that "[c]ounsel should use available discovery mechanisms to ascertain the aggravating *and rebuttal evidence* the prosecution intends to introduce, and then throughly investigate to determine whether this evidence can be excluded, rebutted or undercut." Commentary to Guideline 10.11 at p. 111 (emphasis added).

In answering the Court's first question, the government seems to want to have it both ways. It asks the Court to deny the defense discovery of scientific evidence in its exclusive possession which the defense needs to both "throughly investigate" and to rebut the government's case of future dangerousness and to establish the powerfully mitigating fact that Mr. Rudolph has never before committed a violent criminal act. At the same time, the government says that if the defense dares to take advantage of the government's failure to prove up the Atlanta offenses, it may unleash "hundreds of witnesses," including forensic scientists, that the defense will not be prepared to meet. The government seems to imply that this approach is fair because the government has already provided all reports of scientific testing performed on any evidence from the Atlanta investigation. (*Response*, p. 2). But for all of the reasons stated in the Defendant's *Motion For Discovery of Lab Bench Notes and Other Items Crucial to a Fair Assessment of the Government's Scientific Evidence* (Doc. 181), a motion which the government ultimately did not

contest, the furnishing of conclusory and vague laboratory reports does not satisfy the government's discovery obligations.[1] Therefore, this Court should either: (1) order the government to produce the requested discovery, or (2) preclude the government from introducing any scientific rebuttal evidence in the event that the defense utilizes either of the strategies outlined in the Court's first question.

II.

The second question posed by the Court was:

> " How does a capital defendant satisfy his burden of proving he does not have a significant prior history of other criminal conduct if the evidence of such charged (but unproven) conduct is in the exclusive possession of the government ? "

(*Memorandum and Order*, p. 10). The government answers this question as follows:

> "With regard to the Court's second question, the government proposes that the parties enter into the attached Stipulation. The Stipulation could be entered into evidence by the defense and read to the jury during the penalty phase. The Stipulation would thus be positive evidence the defendant could rely upon to satisfy his burden of proof with regard to the mitigating factor that he has no significant prior history of other criminal conduct."

(Response, pp. 5-6). The proposed stipulation reads as follows:

> "The parties agree and stipulate that there is no evidence *before this jury* that the defendant, Eric Robert Rudolph, has a significant prior history of violent criminal conduct."

(emphasis added). The government makes it clear that "[i]t is the intent of the United States ...

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[1] Though the government did not ultimately contest the defendant's right to the bench notes and lab related discovery relevant to the experts the government intends to call at trial, the government has not complied. This failure to comply which is more aptly described as foot dragging, coupled with a continuing reluctance to either produce the evidence in the labs of defense experts or provide adequate equipment to evaluate the evidence in Birmingham has substantially delayed the defendant's ability to investigate, to prepare expert summaries, and to prepare challenges to the scientific evidence. As recent as last week, the government agreed to reconsider its previous refusal to provide necessary equipment to a defense expert in the government's lab and continues to offer to "check on" various items that have been requested for months - all resulting in further continued and unjustified delay.

that this stipulation applies only to the possible existence of the mitigating factor defined at 18 U.S. C. § 3592(a)(5) in the above-styled case and does not otherwise bind either party in any other litigation before *this* or any other Court." (Emphasis added).

An initial problem with the government's proposal is that it leaves unclear whether the government is reserving the right to introduce the Atlanta crimes in rebuttal if the defendant seeks to take advantage of the stipulation in either of the two ways suggested in the Court's first question. One reading of the government's statement of intent is that the government is attempting to reserve its right to introduce the Atlanta crimes in rebuttal if the defendant uses the stipulation for any purpose, including to rebut future dangerousness or to establish the mitigating circumstance of no history of violent criminal conduct. This interpretation would render the benefit of the "bargain" wholly illusory for the defendant and would seem to be contradicted by the very wording of the stipulation. Another reading is that the government is attempting to reserve its right to introduce the Atlanta crimes in rebuttal only if the defendant uses the stipulation to rebut future dangerousness. If this is the correct interpretation, then the defendant respectfully declines to accept the stipulation because it does not go far enough and would be constitutionally unacceptable. As stated by the Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154, 164 n. 5 114 S.Ct. 2187, 2194 n. 5 (1994): "The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness."

A second objection to the stipulation is its anemic language: "The parties agree and stipulate that there is no evidence *before this jury* that the defendant, Eric Robert Rudolph, has a significant prior history of violent criminal conduct." (emphasis added). In the context of the present case, where the government has already repeatedly saturated the media with the theme that Eric Rudolph is guilty of both the Birmingham and the Atlanta bombings, it will no doubt be the

case that members of his jury will be aware of the Atlanta accusations. As indicated in the public opinion polls offered in support of defendant's motion to change venue, the level of prejudgement in this case is extremely high. Of course, any juror who is seated in this case will be instructed to set aside any prejudgements and to decide this case only on the basis of evidence presented in the courtroom. Despite these precautions, the defense must be concerned with a watered down stipulation which merely informs the jurors that there is no evidence "before this jury" that the defendant has a significant prior history of violent criminal conduct.

The obvious danger is that the jury will take the stipulation to mean that there *is* such evidence of violent criminal conduct but that for some unknown reason it is being withheld. A further admonition that the jury must decide the case only on the evidence brought before it would be counterproductive and would constitute further confirmation that something additional was being withheld. Otherwise, why would such a common sense instruction be given unless the judge was concerned that the jury was going to consider something improper, like the Atlanta offenses which will undoubtedly be discussed during jury selection? Further, why is this evidence, unlike everything else in the trial being handled by a stipulation instead of through the testimony of live witnesses? In *Old Chief v. United States*, 519 U.S. 172, 189, 117 S.Ct. 644, 654 (1997), Justice Souter explained why prosecutors may legitimately reject defense offers to stipulate:

> "The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way."

That same reasoning applies here.

The problems posed by the language of the stipulation is reminiscent of the stipulation confronted by the Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154, 164 n. 5 114 S. Ct. 2187, 2194 n. 5 (1994) where the prosecution argued future dangerousness at penalty phase and the judge prevented the defense from informing the jury of his parole ineligibility and instructed the jury that "you are instructed not to consider parole," and that parole "is not a proper issue for your consideration." In finding a due process violation, the Court condemned the trial court's instructions:

> "It is true, as the State points out, that the trial court admonished the jury that 'you are instructed not to consider parole' and that parole 'is not a proper issue for your consideration.' App. 146. Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact. Undoubtedly, the instruction was confusing and frustrating to the jury, given the arguments by both the prosecution and the defense relating to petitioner's future dangerousness, and the obvious relevance of petitioner's parole ineligibility to the jury's formidable sentencing task. *While juries ordinarily are presumed to follow the court's instructions, see Greer v. Miller,* 483 U.S. 756, 766, n. 8, 107 S.Ct. 3102, 3109, n. 8, 97 L.Ed.2d 618 (1987), *we have recognized that in some circumstances 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.*" *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). See also *Beck v. Alabama*, 447 U.S. 625, 642, 100 S.Ct. 2382, 2392, 65 L.Ed.2d 392 (1980); *Barclay v. Florida*, 463 U.S., at 950, 103 S.Ct., at 3425 ('Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences')."

Simmons, 512 U.S. at 170 (emphasis added)

The government's proposed stipulation in this case is indistinguishable from the one condemned in *Simmons*. The reality is that the jury will not be deciding the case in a vacuum and that the jurors will have had the prior experience of being exposed to the government's media campaign about the Atlanta offenses. A stipulation that there is no evidence "before this jury" of prior violent criminal conduct, coupled with an admonition that the jury must decide the case only

on the evidence brought before them is, in the context of this unique case, one of those rare situations where "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968).

The defense would be satisfied with a stronger stipulation which stated: "The parties agree and stipulate that the defendant, Eric Robert Rudolph, has no history of violent criminal conduct." That stipulation, along with a further stipulation that the government would not offer any evidence of the Atlanta offenses in rebuttal, and proof that the government had accused Mr. Rudolph of the Atlanta offenses would provide a strong factual basis for the defense to argue lack of future dangerousness and the mitigating factors of lack of criminal history and lingering doubt as to guilt and sentencing. The defense suspects that such a stipulation will no doubt be objected to by the government as an inaccurate characterization. If so, the only alternative the defense can envision is to give the defendant access to the scientific information he needs to prove his innocence of the Atlanta offenses.

CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order reversing the magistrate's order and granting his motion for discovery as it relates to the Atlanta offenses.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that on this date of November 8, 2004, I have served this reply upon the attorney for the government placing a copy in the United States Mail postage prepaid and properly addressed to:

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